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February 18, 2000

Via Hand-Delivery

Ms. Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
The Portals
Washington, D.C. 20554

Re: MCI-WorldCom, Inc./Sprint Corp. Merger -- CC Docket No. 99-333

Dear Ms. Salas:

Please find enclosed the original and four copies of the Comments of NEXTLINK Communications, Inc., for filing in the above-referenced docket. Additional copies of the enclosed comments are also being filed today with the Commission's duplicating contractor and other Commission offices, as specified in Public Notice DA 00-104 (rel. January 19, 2000).

Please date-stamp the enclosed duplicate for return with the courier. Please do not hesitate to call me if you have any questions regarding this matter.

Respectfully submitted,

Peter A. Batacan

Enclosures

DC01/BATAP/104961.1

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Applications For Consent	)	CC Docket No. 96-333
To The Transfer Control Of	)	
Licenses And Authorizations	)	
Controlled By Sprint Corporation	)	
Or Its Affiliates To MCI/WorldCom, Inc.	)	

COMMENTS OF NEXTLINK COMMUNICATIONS, INC.

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Its Attorneys

Dated: February 18, 2000

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SUMMARY

NEXTLINK Communications, Inc. respectfully submits that the proposed merger of MCI-WorldCom, Inc. and Sprint Corp., is contrary to the public interest, and should be dismissed, or at a minimum, approved only based on conditions and after further proceedings described in these comments. The proposed merger would create a combined entity with dominant control over almost 70% of the Internet backbone market. In order to avoid this anticompetitive result, the merger must be conditioned, at a minimum, on divestiture of MCI-W's UUNet Internet backbone business.

NEXTLINK's concern regarding the level of market power that would be concentrated in MCI-W/Sprint as a result of the merger is not confined to Internet backbone facilities. It also would have an anticompetitive effect on telecommunications, and, particularly, the competitive exchange access market. The merger would combine MCI-W and Sprint dominant long distance and local exchange carrier – both competitive local exchange ("CLEC") and incumbent local exchange carrier – operations. Sprint already is using its near monopsony purchasing power stemming from its position as one of the "big three" interexchange carriers to engage in an illegal and discriminatory campaign to disadvantage unaffiliated CLECs, including NEXTLINK. To discourage such anticompetitive conduct, NEXTLINK strongly believes that the Commission should not approve the merger unless, at a minimum, it first investigates Sprint's behavior and takes appropriate remedial action.

BEFORE THE
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WASHINGTON, D.C. 20554

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COMMENTS OF NEXTLINK COMMUNICATIONS, INC.

NEXTLINK Communications, Inc. ("NEXTLINK"), by its attorneys, respectfully submits these comments on the above-captioned application (the "Application") of MCI WorldCom, Inc. ("MCI-W") and Sprint Corporation ("Sprint") (collectively, "MCI-W/Sprint" or "Applicants") for Commission consent to their proposed merger.[1] For the reasons discussed below, NEXTLINK urges that the Commission dismiss the Application as contrary to the public interest because the merger, as proposed, would harm competition through undue concentration of market power in the combined entity's Internet and telecommunications facilities. At a minimum, NEXTLINK believes that the Commission should condition any approval of the merger on divestiture of MCI-W's UUNet Internet backbone facilities in order to protect the

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[1] *See* Application for FCC Consent to Transfer of Control of Sprint Corp. To MCI WorldCom, Inc., filed on November 17, 1999 ("Application"); *Commission Seeks Comment on Joint Applications for Consent to Transfer Control filed by MCI WorldCom, Inc. and Sprint Corporation*, CC Docket No. 99-333, DA 00-104, released on January 19, 2000 ("Public Notice").

development and competitiveness of the Internet backbone and access markets in the United States. NEXTLINK also respectfully requests herein that, before this merger may proceed, the Commission should completely investigate whether MCI-W or Sprint has engaged in unlawful or anticompetitive conduct or practices in the competitive exchange access market vis-à-vis unaffiliated competitive local exchange carriers ("CLECs"), such as NEXTLINK. NEXTLINK believes the Commission will conclude that it is appropriate, as a precondition to approving the merger, to order payment of all access charges unlawfully withheld by Sprint as part of its "self-help" campaign targeting unaffiliated CLECs.

I. BACKGROUND

Over its fiber optic network deployed in 48 markets located in 20 states, NEXTLINK provides business customers with integrated competitive local exchange, long distance and high-speed Internet access service. NEXTLINK thus has a vested stake in this proceeding as a competitor of MCI-W and Sprint in the provision of telecommunications and Internet access services. In both local telecommunications and Internet backbone markets, the merger of MCI-W and Sprint will have serious anticompetitive consequences.

The Internet Backbone. With evolving innovations ranging from e-mail and E-commerce to on-line video and audio broadcasts, the Internet has arguably grown to have an impact on almost every aspect of people's lives.[2] The Internet "backbone" is the global network of high-speed transmission lines and routers, and interconnection arrangements between Internet

[2] For example, enterprises as diverse as undertaking and political fundraising have recently implemented E-commerce solutions. *See* Adam Platt, *The Death Business Gets Wired*, The New Yorker, December 6, 1999 at 50 ("HeavenlyDoor.com has been up since May, but the E-commerce competition among undertakers is already fierce"); *see also* Brian Krebs, "McCain Raises Big Money In Online Chat" Newsbytes.com, February 11, 2000.

service providers ("ISPs") which supports digital communications on the World Wide Web.[3] As the top two backbone carriers, MCI-W and Sprint are positioned, through the merger, to achieve dominant control over the Internet. Accordingly, in order to avoid this anticompetitive concentration and attendant harm to the Internet, the MCI-W/Sprint merger must be conditioned at a minimum, on divestiture of MCI-W's UUNet Internet backbone business.

Competitive Exchange Access. NEXTLINK's concern regarding the level of market power that would be concentrated in MCI-W/Sprint as a result of the merger is not confined to Internet backbone facilities. The merger also threatens anticompetitive consequences for telecommunications, and, particularly, the competitive exchange access market. This is more than a merely hypothetical concern. The merger would combine the Applicants' dominant long distance and local exchange carrier, both CLEC and incumbent local exchange carrier ("ILEC"),[4] operations. As a competitor to MCI-W and Sprint in these markets, NEXTLINK strongly believes the MCI-W/Sprint merger should not be approved because Sprint already is using its near monopsony purchasing power stemming from its position as one of the "big three" interexchange carriers to engage in an illegal and discriminatory campaign to disadvantage unaffiliated CLECs, including NEXTLINK. NEXTLINK's claim of anti-competitive behavior is based upon Sprint's intentional and comprehensive program to withhold switched access charges owed to NEXTLINK and other CLECs, alleging that the lawfully tariffed access rates

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3 *See* Supplemental Internet Submission of MCI-WorldCom/Sprint, filed on January 14, 2000, in CC Docket No. 99-333 ("MCI-W/Sprint Supplement") at 3 (citing *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control*, 13 FCC Rcd 18025 at note 383 (1998) ("*MCI-W Order*").

4 MCI's CLEC affiliate MCI-Metro is the nation's second largest CLEC. *See* Application at 21. According to the Application, the combined entity also would gain Sprint's CLEC and ILEC operations through Sprint Local Telecommunications Division, which serves approximately 7.9 million access lines in 18 states, and is the nation's sixth largest ILEC. *Id.* at 25.

are too high. Moreover, Sprint has discriminated against non-affiliated CLECs by paying access charges of its own local affiliates and permitting its own local affiliates to charge other carriers access rates that equal or exceed the rates Sprint refuses to pay.[5] This type of behavior suppresses emergent competition of unaffiliated CLECs such as NEXTLINK and is only possible because of Sprint's large share of the long distance marketplace.[6] Indeed, as suggested in the *SBC-Ameritech* proceeding, past discriminatory conduct by a merger party provides adequate ground under the Commission's public interest test for a finding that such harmful conduct may increase through merger.[7] If such activity is not halted, merger approval also would create the potential for the larger combined company – controlling over thirty percent of

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5 NEXTLINK has filed comments and submitted evidence before the New York Public Service Commission ("NYPSC"), in connection with that agency's review of MCI-W/Sprint's Petition for consent to the merger, on Sprint's unlawful and discriminatory conduct with respect to non-payment of tariffed access charges. *See* Comments of NEXTLINK, filed in Case No. 99-C-1710, on February 4, 2000, and Reply Comments filed on February 14, 2000, before the NYPSC.

6 Tellingly, Sprint's long distance unit has not extended its self-help campaign to ILECs despite its historical contention that ILEC access charges are too high and despite the fact that the overwhelming percentage of Sprint's access charges are paid to ILECs, not CLECs. It is likely that this decision is based on the relative market power of the parties involved and Sprint's dual role as an ILEC and a long distance carrier.

7 *See SBC-Ameritech* at note 35 *infra*.

the long distance market[8] – to extend such anticompetitive and unreasonably discriminatory conduct against unaffiliated CLECs.[9]

II. MERGER OF MCI-W AND SPRINT INTERNET BACKBONE FACILITIES WILL HAVE A SERIOUSLY ANTICOMPETITIVE EFFECT ON THE INTERNET

The Internet backbone, as its name implies, provides the long-haul structure to Internet services, in contrast with Internet access, which is the local connections of users, servers, and ISPs. A competitive Internet backbone market will create downward pricing pressure for all Internet services. Undue concentration in that market would lead to higher charges, excluding many individuals and businesses from benefits the Internet can bring, and also increasing the "Digital Divide" between those with and those without access to the Internet. A lack of competition in the Internet backbone market will ultimately stifle innovation in the downstream markets, a hallmark of the Internet's success to date.

The national and intrastate markets for Internet access, while growing, are not so robustly competitive that they would not be threatened if MCI-W and Sprint, the nation's two largest backbone providers, were allowed to merge their Internet backbone facilities. Nationwide, Internet access – currently estimated to have penetrated approximately 49 percent

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8 Based on recent FCC statistics on long distance revenues, after the merger, MCI-W/Sprint would hold 36% of the nation's long distance market, with AT&T at 43% and the remaining 21 dispersed among numerous second-tier carriers, none with more than 2.5% share and most much smaller than that. *See* FCC Common Carrier Bureau, Indus. Analysis Div., *Trends in Telephone Service*, Table 11.3 (Sept. 1999).

9 Among other things, Sprint has unreasonably withheld payment of nearly $2 million in fees for switched access to NEXTLINK's network for origination and termination of long distance calls. *See* Letter from Brad E. Mutschleknaus, Counsel to NEXTLINK, to Richard H. Juhnke, Sprint Communications, *Re: Unlawful Refusal of Sprint Communications to Pay Tariffed Switched Access Charges of NEXTLINK Communications*, dated November 23, 1999 ("Mutschleknaus-Juhnke Letter), a copy of which is attached hereto as Attachment A.

of the U.S. population[10] – is not nearly as ubiquitous as telephone service. According to a 1998 U.S. Department of Commerce Study, the so-called "Digital Divide" between information "haves" and "have-nots" has actually widened over the last two decades.[11] In these circumstances, especially, it would be deleterious to permit concentration of ownership of Internet backbone facilities in a few, large nationwide carriers. But that is exactly what would happen if this Commission allows the merger of MCI-W and Sprint's Internet backbone facilities.

Through its stand-alone subsidiary, UUNet, MCI-W provides Internet backbone services.[12] Sprint provides Internet backbone services through equipment, personnel and related support functions that – in comparison to the separate nature of MCI-W's telecommunications operations from UUNet Internet operations – appear to be enmeshed with Sprint's telecommunications line of business.[13] Together, the firms would be approximately as large as

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10 *See Spotlight: How Big Is the U.S. Net Population?* by David Lake, The Standard, December 8, 1999 (www.thestandard.com/metrics/display/02149,1071,00.html).

11 *See Falling Through the NET: Defining the Digital Divide,* at Appendix – Trendline Study on Electronic Access by Household: 1984-1998 (U.S. Dep't of Commerce (1999); *see also Closing the Digital Divide* (www.digitaldivide.com).

12 The information provided on UUNet's web site suggests that UUNet has been maintained by MCI WorldCom as a structurally separate subsidiary. The fact that UUNet maintains its own web site (www.uu.net) separate and apart from the web site of MCI WorldCom (www.wcom.com) is noteworthy in and of itself. Apart from identification of UUNet as an MCI WorldCom subsidiary and links to MCI WorldCom's own web site, UUNet's web site is remarkably bereft of information concerning MCI WorldCom.

13 Sprint has publicly described its core Internet backbone as being supported by personnel and operations "shared" between its telecommunications and Internet business. These include operations and customer service personnel assigned to Internet backbone infrastructure, ranging from fiber optic network facilities, to entrance facilities connecting Internet Points of Presence to backbone nodes, SONET and Wave Division Multiplexing facilities. Sprint also employs hundreds of shared personnel in development and support of underlying systems associated with its Internet services. *See* Comments of Sprint Corporation, in CC Docket No. 97-211, filed on June 11, 1998 at 9-10.

the next eleven Internet backbone providers combined.[14] A combination of the MCI and Sprint Internet businesses would create a combined company with a dominant position in the Internet backbone market, many times larger than the nearest competitor. As the Yankee Group observed in October 1999, "a combined MCI-Sprint would represent between 60% and 70% of the Internet backbone market." The Yankee Group further observed that the combined entity would own and operate six of the eight largest traffic exchange points on the public Internet and would "create an unhealthy balance of power" in the Internet backbone market.[15] International Data Corp.'s 1999 analysis of ISP Wholesale Services Revenues and Shares shows MCI/WorldCom with a 56.7 percent share and Sprint with an 11.2 percent share, representing a combined share of 67.9 percent.[16]

A merger of Internet backbone facilities of this magnitude will enable MCI-W and Sprint to readily manipulate the terms and conditions of Internet "peering" arrangements[17] for interconnection with larger carriers, and make it even more difficult for small carriers. NEXTLINK itself has experienced the obstacles of establishing peering arrangements with Tier-1 Internet backbone providers such as MCI-W and Sprint. Indeed, one of the purposes of NEXTLINK's recently announced agreement to buy Concentric Network Corp. ("Concentric")

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14 *See* Bill McCarthy, *Backbone Market Share*, Boardwatch Magazine's Directory of Internet Service Providers at 4 (11th Ed. 1999).

15 *See* Yankee Group, *MCI WorldCom and Sprint Merger: Telecom Fusion: The World is Getting Smaller* at 11 (October 15, 1999) ("Yankee Group Study").

16 *See* Internet Service Provider Market Review and Forecast, 1998-2003, International Data Corp. (www.idc.com) at pp. 2 and 30 and Table 15 Internet Service Provider Wholesale Services Revenues and Share, 1999 ("IDC Study").

17 In 1995-1996, the largest Internet backbone providers began to establish so-called "peering" arrangements with each other. Peering is a contractual arrangement whereby two entities agree to exchange and terminate each other's Internet traffic without imposing charges or requiring net settlement payments from each other. Peering arrangements remain in place today among the largest Internet backbone providers, and they are a principal factor in keeping ISP rates to subscribers as low as they are today.

for $2.9 billion was so that NEXTLINK could assume Concentric's existing rights to Internet backbone infrastructure.[18] A combined MCI-W/Sprint will make it even more costly to establish peering for other carriers, as the market is tipped closer to monopolization by one dominant carrier.[19]

The danger presented by the merger, however, is not simply a question of whether MCI-W/Sprint will refuse to extend peering arrangements to new carriers. Of equally pressing concern is whether the combined entity will have sufficient market power to selectively degrade individual peers and force those peers to move to a paid transiting relationship for Internet backbone facilities.[20] For example, MCI-W/Sprint could refuse to provide peers with capacity necessary to keep pace with the burgeoning level of Internet traffic. With the combined entity's market share standing at nearly 70%, degraded interconnection with MCI-W/Sprint would be disastrous for MCI-W/Sprint's existing smaller competitors who will of necessity depend heavily on that interconnection to provide service to their customers. Conversely, such degraded interconnection with other existing, smaller Internet backbone providers would only amount to a minor inconvenience for MCI-W/Sprint ISP customers because the combined company would have only a smaller percentage of its traffic affected. The end result of such a capacity squeeze

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18 *See NEXTLINK to Buy Concentric Network for $2.9 Billion*, January 10, 2000, Bloomberg News (www.cnetinvestor.com).

19 *See* Denise Caruso, *Mergers Threaten Internet's Informal System of Data Exchange*, New York Times On the Web, www.nytimes.com (February 14, 2000). A copy of this article is attached hereto as Attachment B.

20 Internet backbone providers enter into so-called "transit" relationships with smaller backbone providers or ISPs whereby the former receives fees from the latter for transporting and terminating Internet traffic. Transit arrangements are prevalent when there is a significant imbalance in the traffic flows between entities to warrant the payment of compensation.

likely would be that the smaller Internet backbone provider would be forced to pay transit fees to keep pace with the capacity it needs.

Since the merger of MCI-W and Sprint will give the combined company effective control over transit fees and thereby enable the combined company to raise its rivals' cost of providing Internet service for transmission of Internet traffic of smaller providers, it will also have an adverse impact on the end-users. Ultimately, if MCI-W and Sprint are allowed to merge, and "transit" charges rise -- and the need for backbone providers to pay such charges increases -- the cost of Internet access to residential and business customers would increase. Thus, the merger will be detrimental to Internet end-users.

Nor does the MCI-W/Sprint Supplement make a case that the potential harm to Internet customers from the merger would be outweighed by any benefits the merger allegedly may produce. It is well settled that the public interest, convenience and necessity standard is flexible, and that the Commission must construe it so as "to secure for the public the broad aims of the Communications Act."[21] The public interest standard necessarily encompasses the goal of promoting development of the Internet and advanced telecommunications services by protecting competition in the Internet backbone market,[22] as Sprint itself agrees. The Commission also has recognized its jurisdiction to consider anticompetitive effects on the Internet backbone market as part of a merger analysis and its authority to order divestiture of Internet assets as a merger

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21 *NYNEX-Bell Atlantic,* 12 FCC Rcd at 20002, ¶31 *citing Western Union Division, Commercial Telegrapher's Union, A.F.L. v. United States,* 87 F. Supp. 324, 335 (D.D.C. 1949), *aff'd* 338 U.S. 864 (1949); *Washington Utilities and Transportation Comm'n v. FCC,* 513 F.2d 1142, 1147 (9th Cir. 1975); *FCC v. RCA Communications, Inc.,* 346 U.S. 86, 93-95 (1953).

22 *NYNEX-Bell Atlantic,* 12 FCC Rcd at 20002-03, ¶31 ("[T]he public interest standard necessarily encompasses the goal of promoting competition . . . .").

condition.[23] In view of the Commission's broad mandate for promoting competition advanced and Internet services, MCI-W/Sprint's Supplement, which was filed to specifically demonstrate the purported benefits of the merger on the Internet, falls woefully short of the mark. MCI-W/Sprint's claim that UUNet has entered into additional peering arrangements since 1998 does not diminish the fact that most ISPs will be hard-pressed to match the requisite traffic volumes to reach "peer" status of the combined company. *Cf.* Supplement at 20. Moreover, the MCI-W/Sprint's emphasis in the Supplement on the alleged beneficial impact of alternative content delivery innovations such as caching as "an effective means of reducing utilization of Internet backbone network" implicitly concedes that demand for Internet backbone access may now, or soon grow, to exceed available Internet backbone capacity. *Id.* In light of actual or potential constraints on available Internet backbone capacity, the concentration of ownership of almost 70% of existing capacity in MCI-W/Sprint would have an arguably *per se* anticompetitive effect on Internet access, notwithstanding innovations in spectrum-efficient, or other digital compression techniques.

Concern about market concentration in Internet backbone facilities is nothing new. Notably, in 1998, Sprint itself predicted harm to the Internet from the merger of MCI and WorldCom, which would have resulted in less concentration than the proposed combination here would create.[24] Sprint stated in comments to the FCC that the concentration of ownership of

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23 *MCI/WorldCom Order*, 13 FCC Rcd at 18,103-04, ¶142.

24 According to European regulator estimates, in 1998, the pre-divestiture MCI-W would have held between "42 and 52 percent" of the Internet backbone market. *See* SBC Comments at note 51 (citing Commission of the European Communities, WorldCom/MCI Decision at ¶ 113 (July 8, 1998). Sprint itself in 1998 comments to the FCC on the MCI-W merger estimated that that merger would give MCI and WorldCom over 54 percent of the ISP backbone market. *See* Comments of Sprint Corp., filed before FCC on March 13, 1998 in CC Docket No. 97-211 at 10. In contrast, the merger here would result in MCI-W/Sprint holding up to 70 percent of the ISP backbone market. *See* Yankee Group Study; IDC Group Study at nn. 15-16 *supra*.

Internet infrastructure in the combined company MCI-W would give it "market power that [could] be used to reduce competition in the core Internet backbone market."[25] Moreover, due to concerns such as those raised by Sprint, FCC and EU regulators required divestiture of MCI's then existing Internet subsidiary, internetMCI ("iMCI"), as a condition of approval of MCI-W. Given that the combination of MCI-W and Sprint's current internet businesses in the present merger would vest MCI-W/Sprint with control over 67.9 percent of the Internet access market,[26] there is as much, if not more reason, for concern that the combination of their Internet backbone infrastructure would give MCI-W/Sprint dominance in Internet access market, and harm competition.

Even if MCI-W and Sprint volunteered to sell or were ordered to divest their Internet backbone assets as a condition of regulatory approval, it is not clear that divestiture alone would ensure any long-standing beneficial effect for consumers from the merger. In spite of the 1998 divestiture of iMCI as a condition of Federal and European regulatory approval of the merger of MCI and WorldCom, the spate of post-divestiture complaints and litigation that have been lodged against MCI-W suggests that consumers of Internet services have yet to realize the promised benefit of that merger.[27] Allegedly due to MCI's failure to adhere to the terms of

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25 *See* Comments of Sprint Corp., filed before FCC on March 13, 1998 in CC Docket No. 97-211 at 2.

26 *See* Yankee Group Study; IDC Group Study at nn.15-16 *supra*.

27 *See* Rebecca Blumenstein and Stephanie N. Mehta, *Lost in the Shuffle: As the Telecoms Merge and Cut Costs, Service Is Often a Casualty*, Wall Street Journal, January 19, 2000 at A1, A6 (stating that customers of iMCI "were put through a very difficult time" due to alleged delay by MCI in transferring customer accounts and services to Cable & Wireless after the divestiture sale of MCI's Internet business to that company).

the divestiture sale of its Internet business to Cable & Wireless, Cable & Wireless has been dealt a set back in rolling out its Internet backbone business.[28]

Assuming the Commission ultimately consents to the MCI-W/Sprint merger, approval of the Application would only be in the public interest if, at a minimum, conditioned on the divestiture of MCI-W's stand-alone UUNet Internet backbone facilities. Sprint's Internet business is integrated into Sprint's other telecommunications businesses in the same way that iMCI formerly was integrated into MCI's other businesses. By contrast, UUNet historically has operated, and operates today, on a more stand-alone basis. In these circumstances, the Commission must require the full and complete divestiture of UUNet as a condition of approving the merger between MCI WorldCom and Sprint. Because UUNet still operates as a stand-alone company, MCI WorldCom has far more limited opportunities to sabotage the divestiture. Assuming modest Commission oversight of the divestiture process, UUNet will be a strong and vibrant Internet backbone competitor at the time it is divested. By contrast, divesting the Sprint Internet backbone business would give the combined company the same opportunity that MCI-WorldCom had with iMCI to ensure that the divested company is a weaker competitor than it was when operated on an integrated basis. Such a handicap may require years for owners to overcome, during which time other Internet backbone providers, ISPs and consumers will be disadvantaged.

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28 *See* Testimony of Mike McTighe, CEO, Cable & Wireless, Global Operations, Before the Senate Comm. On Commerce, Science, Transp., Hearings on Mergers in the Communications Indus., Nov. 8, 1999 (MCI WorldCom divested MCI's Internet business in such a way as to "threaten to impair Cable & Wireless's competitiveness"); and Complaint, Cable & Wireless USA, Inc. v. WorldCom, Inc., Civ. Action No. 99-204 ¶¶ 37-40 (D. Del. March 31, 1999).

III. THE MERGER WOULD HAVE A DELETERIOUS IMPACT ON TELECOMMUNICATIONS COMPETITION

After the merger, MCI-W/Sprint would be the second largest long distance carrier in the country. This will give MCI-W/Sprint near-monopsony buying power in the exchange access market. At the same time, MCI-W and Sprint already individually possess substantial CLEC and ILEC operations, which are in the business of selling exchange access service to long distance carriers for the origination and termination of long distance calls. As such, MCI-W/Sprint will have a powerful incentive to discriminate against unaffiliated CLECs and favor their own local exchange operations. Unfortunately, this is not merely a theoretical concern, as Sprint, for one, has discriminated against non-affiliated CLECs, including NEXTLINK, by refusing payment of their tariffed switched access charges, alleging that the charges are excessive. Sprint, however, is not enforcing the same policy with respect to its own LEC and wireless affiliates even when their access charge rates equal or exceed those charged by NEXTLINK. This behavior suppresses emergent competition of unaffiliated CLECs such as NEXTLINK.

Since August, 1999, Sprint has engaged in specific unlawful conduct by unilaterally refusing payment of a portion of tariffed switched access charges Sprint owes to NEXTLINK,[29] for originating and terminating long distance calls. Sprint contends that it can withhold payment and retroactively award itself credits dating back nearly two years for access charge amounts owed to NEXTLINK that Sprint claims exceed those charged by the ILEC in the

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[29] *See* Letter from Dana Amacher, Process Analyst, Sprint Access Verification, to Stephanie Scott-Jones, NEXTLINK, dated August 25, 1999 ("Sprint believes . . . [NEXTLINK's] access charges are wholly unjustifiable and we will withhold payment, both on a going-forward basis, and for past bills Nextlink[sic] has rendered"). A copy of this letter is attached to Attachment C, below.

same region.[30] As of November 1999, these withheld charges totaled nearly $2 million.[31] As of November, 1999, these withheld charges totaled nearly $2 million.[32] Sprint's actions are clearly unlawful and anticompetitive under both the filed rate doctrine[33] and the FCC's recent decision in *MGC v. AT&T.*[34] In *AT&T v. MGC*, the FCC held that an interexchange carrier ("IXC") may not unilaterally withhold payment of tariffed access charges owed to a CLEC. Such actions not only cause direct anticompetitive harm to non-affiliated CLECs by raising their costs of service, but are also extremely harmful to consumers.

Unless these anticompetitive tactics are stopped, FCC approval of the merger would result in increased harm to CLEC competition, with attendant injury to long distance end users. Indeed, in the *SBC-Ameritech* proceeding, the FCC found that where an incentive to engage in discriminatory conduct has been shown between the merger parties, it can be assumed that such conduct would likely increase with the combination of firms with a dominant position.[35] Moreover, the unlawful and discriminatory actions of Sprint are not isolated to NEXTLINK. It is NEXTLINK's understanding that Sprint has launched a systematic campaign

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30 *See* Letter from R. Gerard Salemme, Senior Vice President, NEXTLINK, to Glenn Reynolds, FCC, dated January 14, 2000, attached hereto as Attachment C.

31 *See id.*

32 *See* Mutschleknaus/Juhnke Letter ("I am writing on behalf of . . . NEXTLINK to demand payment of over $1.4 million in past due switched access charges owed to it by Sprint").

33 Under the filed rate doctrine, the tariffed rates, terms and conditions control the rights and obligations of the parties. *See Associated Press*, 72 F.C.C.2d 760 (1979).

34 *See MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999), *aff'd on review* Memorandum Opinion and Order, FCC 99-408 (released December 28, 1999) ("*MGC v. AT&T*").

35 *See Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, FCC 99-279, 1999 FCC LEXIS 5069 at ¶ 228 (October 8, 1999).

to discriminate against many other unaffiliated CLECs, while favoring only the ILECs and Sprint or MCI-W local affiliates with full payment of access charges. By refusing payment of millions in tariffed access fees duly owed to unaffiliated CLECs, MCI-W/Sprint will raise their rivals' costs of providing competitive exchange access. Ultimately, the distortions to the exchange access market due to MCI-W/Sprint's discrimination against unaffiliated CLECs thus would translate into higher prices and potential deterioration in services for telecommunications customers.

The position advocated by Sprint, AT&T and others before the FCC that an IXC may elect not to pay tariffed CLEC switched access charges, and that such CLEC charges must mirror ILEC rates, has no basis in current Commission rule or policy. AT&T's 1998 petition for a declaratory ruling raising the issue whether IXCs may elect not to pay tariffed CLEC switched access charges has been denied and issues regarding CLEC access charges are pending in further rulemaking in the *Access Charge* proceeding.[36] There has been no definitive or final order in that proceeding removing the obligation of IXCs to pay tariffed CLEC switched access charges for such services. Absent any change in Commission statutory and regulatory requirements governing payment of a common carrier's tariffed schedule of charges, it thus remains unlawful for any IXC, including MCI-W or Sprint, to discriminatorily or unilaterally refrain from paying a CLEC tariffed switched access charges.

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36 *See* AT&T Petition for Declaratory Ruling, filed on October 23, 1998, CCB/CPD 98-63; Public Notice DA 98-2250, dated November 8, 1998 (requesting that the FCC issue a declaratory ruling confirming that, under existing law and Commission rules and polices, IXCs may elect not to purchase switched access services offered under tariff by CLECs); *see also Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, CC Docket No. 96-262, CC Docket No. 94-1, CCB/CPD File No. 98-63, CC Docket No. 98-157, 16 CR 3018 at ¶¶ 237-238, 287(August 27, 1999) ("*Access Charges*").

In view of the increased threat to competitive exchange access competition posed by the merger, NEXTLINK believes that the Commission must, at a minimum, fully investigate existing instances of unlawful or discriminatory conduct by Sprint or MCI-W against unaffiliated CLECs. The Commission has a variety of procedural tools available for closely examining the potential negative impact of specific anticompetitive consequences of a proposed merger, such as the public fora and *ex parte* meetings it has held in processing the SBC/Ameritech and pending AT&T/MediaOne mergers.[37] Only after a fuller investigation of the extent of non-payment of CLEC switched access charges and other anticompetitive conduct committed by Sprint or MCI-W against unaffiliated CLECs – and payment of such charges – may the Commission safely proceed to a finding that the merger would be in the public interest.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, NEXTLINK Communications, Inc., respectfully urges that the Commission dismiss MCI-W/Sprint's Application for approval of the merger as contrary to the public interest. In the absence of dismissal, at a minimum, the Commission must require divestiture of MCI-W's UUNet Internet

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37 *See, e.g.*, Commission Announces Public Forum on SBC Communications Inc. and Ameritech Corporation, Applications for Transfer of Control, CC Docket No. 98-141, Public Notice, DA 99-810 (rel. Apr. 28, 1999); SBC-Ameritech Public Forum Extended for Second Day, CC Docket No. 98-141, Public Notice, DA 99-837 (rel May 4, 1999); Statement of FCC Chairman William E. Kennard on Conditions for SBC-Ameritech Merger (rel. May 6, 1999); *see also* Cable Services Bureau to Hold Public Forum on AT&T/Media One, CS Docket No. 99-251, Public Notice, DA 00-138 (rel. Jan. 28, 2000); *AT&T/MediaOne*, Order, CS Docket No. 99-251 (rel. Jan. 13, 2000) (establishing Sur-Reply Comment Period and Extending the Period for Oral Ex Parte Meetings).

backbone business. Finally, NEXTLINK strongly believes that the Commission must first fully investigate any actual unlawful or discriminatory conduct of Sprint and MCI-W against unaffiliated CLECs. The Commission, in light of such tactics, should address the potential for increased harm to local telecommunications competition, and order appropriate relief, before it may conclude that the MCI-W/Sprint merger is in the public interest.

Respectfully submitted,

NEXTLINK Communications, Inc.

By: R. Gerard Salemme /PAB

R. Gerard Salemme, Senior Vice President
Cathleen A. Massey, Assistant General Counsel
NEXTLINK Communications, Inc.
1730 Rhode Island Ave., N.W., Suite 1000
Washington, D.C. 20036
(202) 721-0999

and

Edward A. Yorkgitis, Jr.
Peter A. Batacan
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Its Attorneys

Dated: February 18, 2000

ATTACHMENT A

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS
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SUITE 500
WASHINGTON, D.C. 20036
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FACSIMILE
(202) 955-9792

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BRUSSELS, BELGIUM
HONG KONG

AFFILIATED OFFICES
NEW DELHI, INDIA
TOKYO, JAPAN

November 23, 1999

BRAD E. MUTSCHELKNAUS
DIRECT LINE (202) 955-9765
E-MAIL: bmutschelknaus@kelleydrye.com

Richard H. Juhnke
Sprint Communications
1850 M Street, N.W.
Suite 1110
Washington, D.C. 20036

Re: Unlawful Refusal of Sprint Communications to Pay Tariffed Switched Access Charges of NEXTLINK Communications

Dear Dick:

I am writing on behalf of my client, NEXTLINK Communications ("NEXTLINK"), to demand payment of over $1.4 million in past due switched access charges owed to it by Sprint Communications ("Sprint"). As described hereafter, Sprint ordered and received switched access services pursuant to NEXTLINK's federal and state access services tariffs, but has unlawfully engaged in self-help in a dispute over the related rate levels, and is withholding payment of a growing backlog of charges. Unless payment is made immediately, NEXTLINK intends to commence formal proceedings against Sprint to recover the amounts owed to it.

As you may be aware, Sprint has routinely and knowingly accepted access traffic routed to it by NEXTLINK from end users presubscribed to Sprint, and routed interexchange traffic to NEXTLINK for termination to end users of NEXTLINK. Sprint accepted such traffic from NEXTLINK, and routed such traffic to NEXTLINK for termination, in accordance with the terms of NEXTLINK's switched access services tariffs, and NEXTLINK provided the requested switched access services in good faith as it is legally obligated to do. Sprint did not indicate to NEXTLINK that it wanted its traffic blocked, or otherwise seek to cancel service. Sprint also did not lodge a complaint with regulators contesting NEXTLINK's tariffed rate levels.

Instead, Sprint first notified NEXTLINK by correspondence dated August 25, 1999, that it objected to NEXTLINK's tariffed rate levels, and that Sprint would withhold payment both prospectively and retroactively (by claiming credits for alleged past

overpayments). Sprint based its dispute on its contention that certain NEXTLINK switched access charges may exceed those charged by un-named incumbent local exchange carriers ("ILEC"). By correspondence dated November 9, 1999, Sprint further objected to NEXTLINK's practice of including portions of its Presubscribed Interexchange Carrier Charges ("PICC") in per minute usage rates, rather than assessing the full amount on a per line basis.

NEXTLINK is under no obligation to mirror the rate levels charged by the ILECs with which it competes. In addition, its access charge rate structure is a matter of its own choosing. If Sprint believes NEXTLINK's tariffed charges are unreasonable, it is free to file complaints against NEXTLINK's tariffs at the FCC or relevant PSCs. However, Sprint may not engage in self-help by simply refusing to pay NEXTLINK's filed rates.

As you may be aware, the FCC recently rendered a decision in a case involving virtually identical facts. In MGC Communications v. AT&T, File No. EAD-99-002 (rel. July 16, 1999), the FCC examined a situation in which AT&T withheld payment of CLEC switched access charges, claiming that they exceeded comparable ILEC rates. The Common Carrier Bureau concluded that AT&T's actions amounted to "impermissible self-help and a violation of section 201(b) of the Act," and held AT&T liable for the CLEC's tariffed charges plus interest. We are confident that the Commission or the courts would reach the same conclusion in this case.

Dick, I must forewarn you that NEXTLINK may not limit its public airing of this dispute to formal complaint proceedings. We believe that Sprint's unlawful dealings with CLECs is relevant to the imminent FCC inquiry examining whether a merger of Sprint and MCI is in the public interest. It may also be advisable to ask the FCC to investigate the dealings between Sprint's interexchange unit with its ILEC affiliates and any Sprint CLEC, as well as the reasonableness of switched access levels charged by both Sprint ILECs and CLECs.

I must emphasize that NEXTLINK strongly prefers to resolve this dispute privately and amicably. NEXTLINK is willing to discuss Sprint's concerns in good faith, but immediate payment of all withheld sums is a precondition to such discussions. If you wish to discuss a resolution, please contact me (202-955-9765) or Doug Kinkoph, Vice President of NEXTLINK (614-416-1468). I must emphasize that time is of the essence. Unless resolution is made by Friday, December 10, 1999, NEXTLINK feels that it will be compelled to seek regulatory or judicial intervention. I look forward to your prompt reply.

Sincerely,

Brad E. Mutschelknaus

BEM/lsw
cc: Gerry Salemme
Cathy Massey
Doug Kinkoph

ATTACHMENT B

February 14, 2000

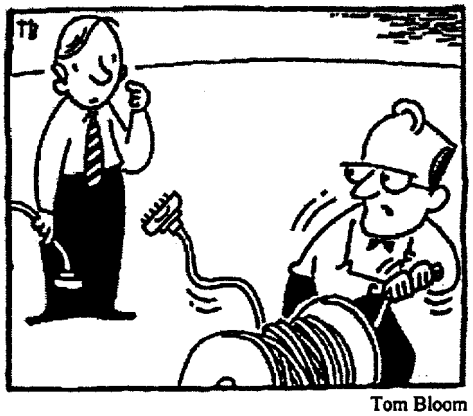
DIGITAL COMMERCE

Mergers Threaten Internet's Informal System of Data Exchange

By DENISE CARUSO

Last week's Web site attacks were a vivid reminder that technology's sword of individual empowerment has a wicked double edge. But the term for the attack technique -- denial of service -- has the potential to assume an equally ominous meaning as telecommunications giants continue to merge their large holdings.

As we know, the Internet is a network of networks. In the beginning of its commercial ascendancy in 1995, this meant that the largest of the Internet service companies -- known as backbone providers -- had to interconnect with their competitors.



Tom Bloom

Using the network access points, or NAPs, that were formerly financed by the federal government, they built businesses delivering data among networks. And in the early days, not much more than a handshake between backbone engineers was needed to ensure that these companies would pass along one another's data, all for the greater good (and growth) of the market.

This "you scratch mine, I'll scratch yours" arrangement is known as peering.

"The assumption in the old days was always, 'I'm going to send you as much data as you send me,'" says David Farber, one of the scientists who helped build the original Arpanet -- the Internet progenitor -- and who is now the chief technologist at the Federal Communications Commission.

And when the two main NAPs became impossibly clogged with traffic, the busiest Internet service providers, or ISPs, formed private peering arrangements to interconnect and exchange data directly with one another.

The global Internet is still defined by the exchange of data between networks. But today, in place of back-scratchy handshakes are book-size contracts drawn up by phalanxes of corporate lawyers.

The backbone provider with by far the largest number of physical connections is UUNET, now owned by MCI Worldcom, which is on its way to becoming Worldcom Sprint. In rough descending order, UUNET is followed by Sprint; Cable and Wireless USA, which acquired MCI Internet as a result of the 1998 MCI-Worldcom merger; GTE Internetworking (after its acquisition of BBN Planet in 1997); and, depending on whom you ask, either PSI Net or AT&T Network Services.

According to prevailing wisdom, a peer is a backbone service provider that agrees to exchange roughly equivalent amounts of data with another provider without requiring that money change hands.

But how exactly does one become a peer? Under what circumstances is a peer a paying customer, and vice versa? Who decides, and how?

"There are no rules for peering," says Fred Goldstein, a network and information technology consultant with Arthur D. Little in Cambridge, Mass. "No one knows what the currency is. It's more a matter of, 'I'll see who blinks first.'"

One might consider this to be an overly loose arrangement upon which to base the New Global Economy.

In the early days of the Internet, self-interest forced backbone providers into peering. Back then, as Farber says, "without the exchange points, nobody would have any traffic."

But that is scarcely true today. It may be even less true tomorrow: upon completion of the Worldcom-Sprint merger, a single company would control nearly half of the Internet's backbone -- making it, literally and figuratively, without peer.

Given the furious pace and high stakes of the telecommunications industry today, some fear that it is only a matter of time before one big backbone provider or another refuses to exchange data traffic with one of its peers.

What happens then?

"Well, they would have a legitimate excuse," says Hal Varian, dean of the school of information management at the University of California at Berkeley. "An ISP could complain, and rightly so, that another ISP was sending them huge amounts of traffic and putting a load on their system."

But then, Varian says, they could also decrease the capacity of "their side of the network so their own traffic is getting swamped."

"That's an excuse to say, 'We can't handle this guy's packets; we aren't going to connect with him,'" he added.

The problem, says Varian, is that there is no way to prove who is zooming whom and no way to resolve such disputes outside the courtroom. And remarkably, there is no rule that requires peers to provide this most basic function of the Internet: what he calls "fair, open and nondiscriminatory" interconnection.

Indeed, says John Nakahata, a partner with the law firm Harris Wiltshire & Grannis in Washington, the kinds of tactics Varian describes are what led to requirements for interconnections and rate regulations in the telephone world of yore.

Nakahata is the former chief of staff for the FCC chairman, William E. Kennard, and was the senior legal adviser to Kennard's predecessor, Reed E. Hundt. Nakahata now represents one of the smaller backbone providers living in the shadow of the proposed Worldcom-Sprint merger.

"The Internet is growing tremendously quickly, thus competition is very fragile," he says. "If a company can start diverting growth through these different tactics, then it becomes a self-perpetuating cycle."

It is easy to fear the worst, for example, when one sees from public filings that Sprint's original merger application to the FCC did not include a mention of its Internet backbone business. Because the FCC would not accept the application without that information, Sprint has since amended and resubmitted it.

"We had already stated to Justice we'd be willing to do a divestiture

if necessary," says J. Richard Devlin, Sprint's general counsel, explaining the omission. The company is now in premerger discussions with the Justice Department about peering and other Internet-related issues, "helping them understand the market," Devlin said.

Despite the unsettled state of affairs, backbone regulation is not yet on the table for discussion.

"My general attitude toward regulation is that you let things go until they require adult supervision," says Farber of the FCC. "In Japanese, the idea translates to 'the sacred sword of last resort.' That's exactly it; that's its proper place."

In other words, Farber says, "If you can't get companies to behave in their own self-interest -- and it is good self-interest to have a vibrant, growing Internet; none of these companies would exist if there wasn't one -- then this sacred sword can be used if necessary."

Growth in the Internet economy depends on robust competition. That is a fact that many companies, particularly network companies, which live and die by scale, conveniently seem to forget after their urge to merge creates a behemoth or two.

"The natural structure in this industry is for there to be only a few backbone providers," Varian says. "The challenge is to see that there are more than one."

Related Sites

These sites are not part of The New York Times on the Web, and The Times has no control over their content or availability.

- UUNET
- Sprint
- Cable and Wireless USA
- GTE Internetworking
- PSI Net
- AT&T Network Services

ATTACHMENT C

NEXTLINK®

January 14, 2000

VIA FACSIMILE
202-418-7223

Glenn Reynolds, Chief
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
RM 5-A865
445 12th Street, S.W.
Washington, DC 20554

Re: Request by NEXTLINK Communications, Inc. for Informal Intervention by the Market Disputes Resolution Division Regarding the Refusal of Sprint Communications to Pay Tariffed Switched Access Changes owed to NEXTLINK

Dear Mr. Reynolds:

NEXTLINK Communications, Inc. ("NEXTLINK"), by its undersigned counsel, hereby requests informal mediation of a dispute with Sprint Communications ("Sprint") regarding Sprint's refusal to pay in excess of $1.5 million in past due switched access charges that it owes to NEXTLINK.

As you may be aware, NEXTLINK is a facilities-based provider of integrated local exchange, interexchange and packet switched telecommunications services. Among other things, NEXTLINK has constructed and deployed fiber optic networks in 48 markets located in 20 states that enable it to provide competitive local exchange services. In some of those markets -- notably, Las Vegas, Nevada – NEXTLINK competes directly with incumbent local exchange telephone companies ("ILECs") and competitive local exchange carriers ("CLECs") owned and operated by Sprint. Clearly, Sprint has reason to flex its muscle to prevent NEXTLINK from competing with Sprint's local operations successfully. Unfortunately, Sprint is using its monopsony purchasing power stemming from its position as one of the "big three" interexchange carriers to accomplish that goal.

1730 Rhode Island Avenue, N
Suite 1000
Washington, D.C. 20036
202.721.0999
fax: 202.721.0995

Specifically, Sprint is engaged in an intentional and comprehensive program to withhold payment of switched access charges owed to NEXTLINK. As described hereafter, Sprint ordered and received switched access services pursuant to NEXTLINK'S access services tariffs, but has unlawfully engaged in self-help by withholding payments rightfully owed to NEXTLINK. Sprint has routinely and knowingly accepted access traffic routed to it by NEXTLINK from end users presubscribed to Sprint, and routed interexchange traffic to NEXTLINK for termination to end users of NEXTLINK. Sprint accepted such traffic from NEXTLINK, and routed such traffic to NEXTLINK for termination, in accordance with the terms of NEXTLINK'S switched access services tariffs on file and effective with the FCC and state PUCs. NEXTLINK provided the requested switched access services in good faith as it is legally obligated to do. Sprint did not indicate to NEXTLINK that it wanted its traffic blocked, or otherwise seek to cancel service. Sprint also did not lodge a complaint with regulators contesting NEXTLINK'S tariffed rate levels.

Instead, Sprint first notified NEXTLINK by correspondence dated August 25, 1999, that it objected to NEXTLINK'S tariffed rate levels, and that Sprint would withhold payment both prospectively *and* retroactively (by claiming credits for alleged past overpayments). Sprint based its dispute on its contention that certain NEXTLINK switched access charges may exceed those charged by un-named ILECs. By correspondence dated November 9, 1999, Sprint further objected to NEXTLINK'S practice of including portions of its Presubscribed Interexchange Carrier Charges ("PICC") in per minute usage rates, rather than assessing the full amount on a per line basis.

NEXTLINK is under no obligation to mirror the rate levels charged by the ILECs with which it competes. In addition, its access charge rate structure is a matter of its own choosing. If Sprint believes NEXTLINK'S tariffed charges are unreasonable, it is free to file complaints against NEXTLINK'S tariffs at the FCC or relevant PSCs. However, Sprint may not engage in self-help by simply refusing to pay NEXTLINK'S filed rates. As you know, the Commission's decision in *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (Comm. Car. Bur.), *aff'd*, FCC 99-408 (rel. Dec. 28, 1999) (*MGC v. AT&T*) involved nearly identical facts. In *MGC*, the FCC examined a situation in which AT&T withheld payment of CLEC switched access charges, claiming that they exceeded comparable ILEC rates. The Commission concluded that AT&T's actions were unjust and unreasonable and held AT&T liable for the CLEC's tariffed charges plus late fees.

On information and belief, we can state that NEXTLINK'S experience with Sprint is not an isolated one. We understand that Sprint has a campaign underway to withhold payment of switched access charges from numerous CLECs. Sprint's own personnel have told NEXTLINK staff that NEXTLINK was targeted for this campaign because the exchange of traffic between the companies has grown significantly over time. In other words, NEXTLINK was not chosen by Sprint as a target for this campaign because NEXTLINK is perceived by Sprint to be a particularly

bad actor. Rather, NEXTLINK apparently was targeted because it is among the most successful and fastest growing CLECs.

In addition, however, we understand that Sprint's interexchange unit is not enforcing the same policy with respect to its own affiliates. We believe that Sprint does not withhold payment of switched access charges from its own LEC affiliates *even when their rates equal or exceed those charged by NEXTLINK*. Obviously, this puts Sprint in the position of curtailing the revenue stream of its competitors while continuing to fund the operations of the LECs with which they compete. Clearly, Sprint is discriminating against unaffiliated CLECs, and using its formidable market position to confer a significant advantage upon its own LEC affiliates.

Pursuant to the Commission's decision in *MGC v. AT&T*, Sprint clearly is liable for past due charges and late fees. An informal expression of concern by Commission staff, before NEXTLINK is compelled to file a formal complaint, could avoid an unnecessary and avoidable drain on the resources of both NEXTLINK and the Commission. Accordingly, NEXTLINK requests that the Market Disputes Resolution Division staff initiate informal contacts with Sprint to begin the mediation process.

NEXTLINK requests that the Commission direct this inquiry to the following:

Leon M. Kestenbaum,
Vice President Federal Regulatory Affairs
Richard Juhnke
General Attorney
Sprint Communications
1850 M Street, N.W., 11th Floor
Washington, DC 20036
Telephone: (202) 857-1792
Fax: (202) 857-1792

To assist you in preparing for the anticipated mediation, I have attached as exhibits the following correspondence: 1) Sprint's August 25, 1999 letter notifying NEXTLINK that it would cease paying the charges to NEXTLINK; 2) Sprint's November 9, 1999 letter objecting to NEXTLINK calculation of the PICC; 3) NEXTLINK's November 23, 1999 demand letter to Sprint; and 4) Sprint's December 9, 1999 response to NEXTLINK's demand letter.

Thank you for your attention to this matter.

Sincerely,

R. Gerard Salemme
Sr. Vice President

cc: Frank Lamancusa, Deputy Chief
Richard Juhnke, Esq. (Sprint)
Cathy Massey (NEXTLINK)
Doug Kinkoph (NEXTLINK)

Dana Amacher, Process Analyst
Sprint-Access Verification
1200 E. 104th St., Suite 200
Kansas City, MO 64131
Phone: (816) 501-8996 → 913-315-5433
Fax: (816) 501-8516

Lori Lavdsen 913-315-5452

August 25, 1999

Stephanie Scott-Jones
C/o Nextlink
500 108th Ave NE, Ste 2200
Bellevue, WA 98004

Dear Ms. Scott-Jones:

This communication is intended to make you aware of Sprint's deep concern regarding the patently excessive level of Nextlink's access charges. Nextlink's current access rates are significantly higher than those of the incumbent LEC serving the areas that bill. Sprint believes these excessive access charges are wholly unjustifiable and we will withhold payment, both on a going-forward basis, and for past bills Nextlink has rendered.

The FCC has indicated that ILEC access charges are the appropriate benchmark for use by CLEC's, such as Nextlink. In that regard, the FCC (specifically in the context of terminating access charges stated in Paragraph 364 of its May 16, 1997 Access Reform Order, that "terminating rates that exceed those charged by the incumbent LEC serving the same market may suggest that a competitive LEC's terminating access rates are excessive." In the same order (Paragraph 363) the FCC "emphasize(d) that we will not hesitate to use our authority under section 208 to take corrective action where appropriate."

Sprint is willing to resolve this issue without resorting to filing a formal complaint with the FCC, and to this end, we request that you call to set up a mutually convenient time within the next two weeks to discuss this matter.

Sprint looks forward to hearing from Nextlink soon on this matter.

Sincerely,

Dana Amacher

Dana Amacher

Lori Larison, Senior Analyst
Sprint – Access Verification
6500 Sprint Parkway
Overland Park, KS 66251
Phone: (913) 315-5452
Fax: (913) 315-0304

November 9, 1999

Next Link
Attn: Lilly Eng
500 108th Avenue NE
Suite 2200
Bellevue, WA 98004

Dear Ms. Eng:

This letter is to inform you of Sprint's concern regarding the inclusion of PICC in the switched access rates which are billed on a per minute basis. In its Access Reform Order, the FCC established PICC as a per line charge. As such, Sprint expects PICC to be billed on a per line basis. Sprint is continuing to pay Next Link for Switched access mileage-sensitive billing at the same rate that it pays the incumbent local exchange carrier in the same geographic region in which Next Link operates.

If you have any further questions or would like further discussion on this matter please give me a call.

Lori L. Larison

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AFFILIATED OFFICES
NEW DELHI, INDIA
TOKYO, JAPAN

November 23, 1999

BRAD E. MUTSCHELKNAUS
DIRECT LINE (202) 955-9765
E-MAIL: bmutschelknaus@kelleydrye.com

Richard H. Juhnke
Sprint Communications
850 M Street, N.W.
Suite 1110
Washington, D.C. 20036

Re: Unlawful Refusal of Sprint Communications to Pay Tariffed Switched Access Charges of NEXTLINK Communications

Dear Dick:

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Dick, I must forewarn you that NEXTLINK may not limit its public airing of this dispute to formal complaint proceedings. We believe that Sprint's unlawful dealings with CLECs is relevant to the imminent FCC inquiry examining whether a merger of Sprint and MCI is in the public interest. It may also be advisable to ask the FCC to investigate the dealings between Sprint's interexchange unit with its ILEC affiliates and any Sprint CLEC, as well as the reasonableness of switched access levels charged by both Sprint ILECs and CLECs.

I must emphasize that NEXTLINK strongly prefers to resolve this dispute privately and amicably. NEXTLINK is willing to discuss Sprint's concerns in good faith, but immediate payment of all withheld sums is a precondition to such discussions. If you wish to discuss a resolution, please contact me (202-955-9765) or Doug Kinkoph, Vice President of NEXTLINK (614-416-1468). I must emphasize that time is of the essence. Unless resolution is made by Friday, December 10, 1999, NEXTLINK feels that it will be compelled to seek regulatory or judicial intervention. I look forward to your prompt reply.

Sincerely,

Brad E. Mutschelknaus

BEM/lsw
cc: Gerry Salemme
Cathy Massey
Doug Kinkoph

C01/MUTSB/97220.1

Richard Juhnke
General Attorney
Federal Regulatory Affairs

1850 M Street, NW, 11th Floor
Washington, D.C. 20036
Telephone: (202) 828-7437
Fax: (202) 857-1792
E-mail: richard.juhnke
@mail.sprint.com

December 9, 1999

Brad E. Mutschelknaus
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Re: Access Charges of NEXTLINK Communications

Dear Brad:

This is in response to your November 23, 1999 letter on behalf of NEXTLINK Communications in which you demand immediate payment of access charges billed to Sprint by NEXTLINK that Sprint has refused to pay. Your letter refers to previous correspondence between Sprint and NEXTLINK, in which Sprint objected to access charges in excess of those of the ILECs with whom NEXTLINK competes and to NEXTLINK's practice of including per-minute usage rates to reflect the amounts recovered by ILECs through the presubscribed interexchange carrier charge (PICC). You state that NEXTLINK is under no obligation to mirror the ILECs' rate levels or structures and claim, citing a Common Carrier Bureau order in *MGC Communications v. AT&T*, File No. EAD-99-002 (rel. July 16, 1999), that Sprint is engaging in impermissible self-help.

Although the FCC has not yet taken direct and definitive action with respect to CLEC access charges, Sprint believes it is a fair reading of both the FCC's May 16, 1997 *Access Charge Reform* Order in CC Docket No. 96-262, and its November 5, 1999 Third Report and Order and Fourth Further Notice of Proposed Rulemaking in that proceeding, that the FCC did not expect CLECs to charge more for access that the ILECs with whom they compete and views with considerable concern the fact that many CLECs are seeking to do so at present. For the reasons set forth in Sprint's October 29 Comments and November 29 Reply Comments in Docket 96-262, it believes that the competing ILEC rate levels are the only appropriate frame of reference against which to measure CLEC access rates.[1] Should the FCC decide otherwise, Sprint will adjust its payment policy

[1] For your convenience, copies of Sprint's Comments and Reply Comments are enclosed.

appropriately. Nonetheless, absent a contrary policy determination by the FCC, Sprint believes that in paying CLECs for access service at the competing ILEC level, it is fully and fairly compensating them for the services they provide.

Sprint believes its payment policy is fully consistent with the FCC's invitation to bring "marketplace forces" to bear on CLEC access charges[2] and does not constitute impermissible self-help. The Bureau decision in the *MGC v. AT&T* case on which you rely, did not explain why the AT&T actions there involved constituted impermissible self-help. The only FCC doctrine against self-help of which I am aware is that a customer that is threatened with termination of service by a carrier for reason of nonpayment cannot seek injunctive relief from the Commission to prevent such termination of service. *See, e.g., Mocatta Metals Corporation*, 42 FCC 2d 453 (1973) and *MCI Telecommunications Corp.*, 62 FCC 2d 703 (1976).[3]

However, it appears that business issues that remain in dispute between NEXTLINK and Sprint are in fact much narrower than the philosophical differences between the companies. Sprint agrees with your assertion that NEXTLINK does not need to mirror the ILEC rate *structure*, and in that regard, the November 9, 1999 letter from Sprint cited in your letter, was in error to the extent that it objected, in concept, to NEXTLINK's use of a per-minute charge to recover costs that ILECs recover through the PICC. Moreover, it appears from a telephone conversation between Cathy Massie of NEXTLINK and me in mid-November, and the more recent discussions between Gary Lindsey, Sprint's Director of Access Verification, and Doug Kinkoph of NEXTLINK, that NEXTLINK intended to base its access charges on those of the ILECs with whom it competes, an intention that is fully consistent with Sprint's views. In the course of the discussions between Messrs. Kinkoph and Lindsey, Sprint became aware that the ILEC rates it had used for calculating the amounts due to NEXTLINK failed to include appropriate allowances for access elements, such as transport and the PICC, for which ILECs charge on a flat-rated basis. Sprint will credit NEXTLINK with allowances for its past understatement of the ILEC rates; I am informed that the adjustment reducing the rate claim is expected to be in the range of $250,000. The only remaining issue in dispute seems to be the method of computing a per-minute equivalent to the ILECs' PICCs. I am told that NEXTLINK's tariffs include a charge of roughly $.018 per minute for the PICC, which is grossly excessive by any reasonable measure. Sprint's credit adjustment, referred to above, will reflect a per-minute factor (currently set at $.00276 per minute) for the PICC which, if anything, errs on the generous side. Should

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[2] *Hyperion Telecommunications Inc., et al.*, 12 FCC Rcd 8596, 8608 (1997).

[3] It may also be observed that the entertaining of MGC's complaint by the Bureau was contrary to established Commission precedent that a complaint by a carrier against a customer for recovery of amounts allegedly owed by the customer – even when that customer is itself a carrier – does not constitute a cause of action under the Communications Act. *See, e.g., Illinois Bell Telephone Company, et al., v. American Telephone & Telegraph Company*, 4 FCC Rcd 5268 (1989). Because of its conflict with *Illinois Bell*, the *MGC* Decision appears to be facially invalid.

NEXTLINK provide an accurate count of lines presubscribed to Sprint, Sprint would compensate NEXTLINK at the PICC per line rate, in the (unlikely) event that this would produce a greater PICC allowance than the amount derived from utilizing the per-minute factor stated above.

I recognize that the forthcoming credit adjustment falls short of the amount demanded by NEXTLINK. However, it is Sprint's hope that NEXTLINK will rethink the reasonableness and sustainability of its approach to calculating a per-minute equivalent of the PICC. Sprint fully shares NEXTLINK's stated preference to resolve this dispute privately and amicably, and stands ready to continue its dialog with NEXTLINK.

Sincerely,

Richard Juhnke

Enclosures

CERTIFICATE OF SERVICE

I, Patricia A. Bell, do hereby certify that I have caused copies of the foregoing **"Comments of NEXTLINK Communications, Inc. "** to be delivered via courier, this 18th day of February, 2000, to each individual listed below.

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Patricia A. Bell